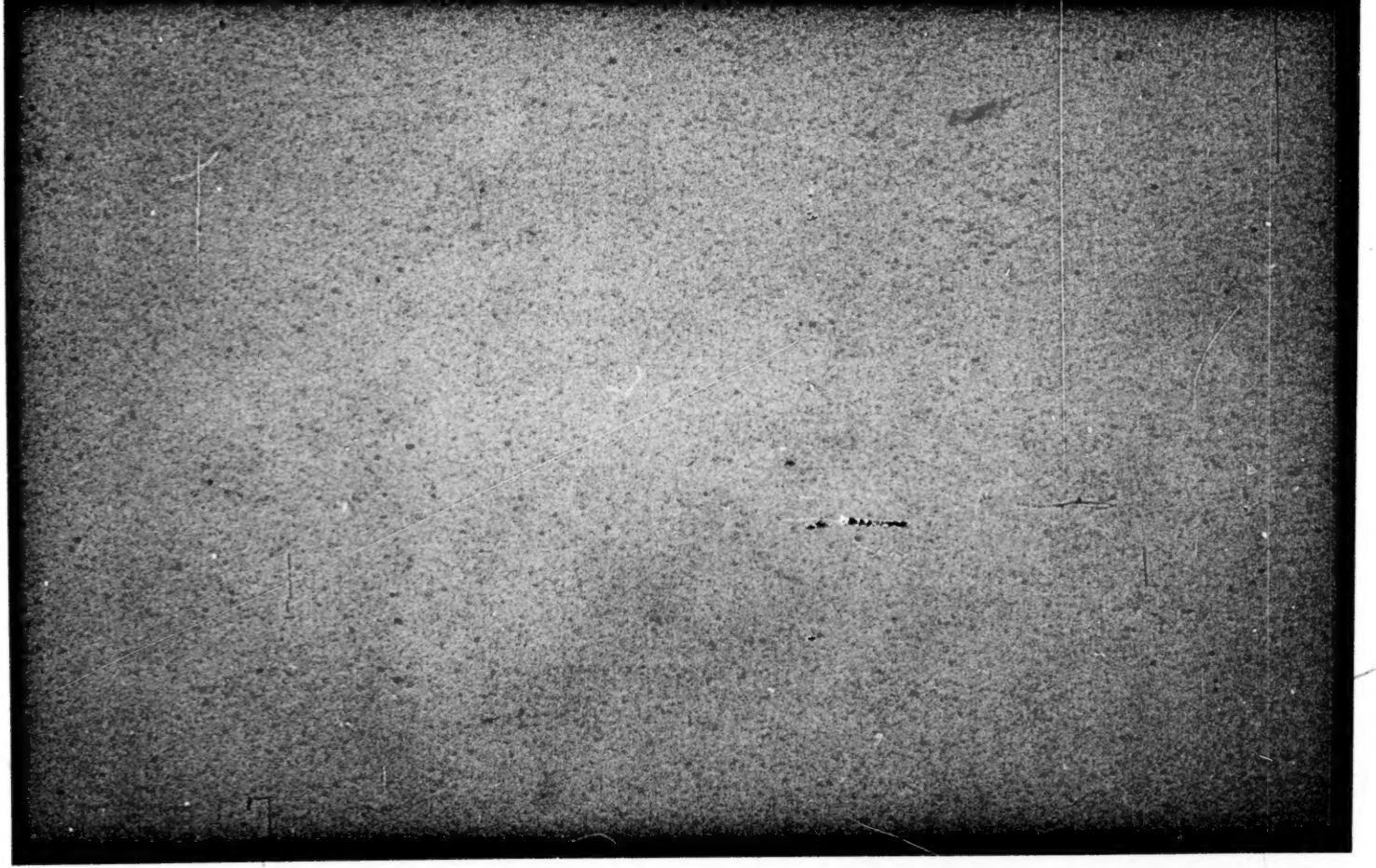

IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-1106

WILLIAM COUSINS, ET AL., *Petitioners,*

v.

PAUL T. WIGODA, ET AL., *Respondents.*

On Writ of Certiorari to the Illinois Appellate Court

BRIEF AMICI CURIAE

For the Americans for Democratic Action, the Independent Voters of Illinois, and the National Women's Political Caucus

JOSEPH L. RAUH, JR.
JOHN SILARD
ELLIOTT LICHTMAN
DAVID S. FISHBACK
1001 Connecticut Avenue, N.W.
Washington, D.C. 20036
Attorneys for Amici Curiae

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We present this brief in support of petitioners with the consent of counsel for both petitioners and respondents.

We rely on petitioners' treatment of this Court's jurisdiction, of the opinions below, of the questions presented, of the constitutional provisions involved, and of the Statement of the Case.

INTEREST OF AMICI CURIAE

The Americans for Democratic Action (ADA), founded in 1947, is an organization of individuals devoted, *inter alia*, to the broadening of the national political parties and the political process generally, through the inclusion of minorities and women and through increased and timely participation of all citizens everywhere. Over the past quarter century, ADA has worked for the reform of both major political parties toward the end of greater public participation therein.

The Independent Voters of Illinois (IVI), the Illinois affiliate of ADA, founded in 1944 under the name Voters for Victory, is an organization of Illinois citizens devoted, *inter alia*, to the broadening of participation in political parties and the political process generally throughout the State of Illinois (and its political subdivisions) through the inclusion of minorities and women and through increased and timely participation of all citizens throughout the State. Some of petitioners' delegation are members of IVI.

The National Women's Political Caucus, founded in 1971, is an organization devoted to involving more women in the political process, especially through their election to office. Since many persons commence or further careers in elective politics by seeking to become delegates to the national political conventions, the openness to women of the process of selecting delegates is a matter of vital concern to the Caucus.

Amici Curiae view the decision below as a grave threat to the progress made over the years toward more open and democratic political parties and political processes.

ARGUMENT

This case presents the critical question of the relationship between state laws dealing with the selection of delegates to national party nominating conventions and the rules, procedures and decisions of the national party conventions themselves. *Amici* hold the view that the decision below that "the law of the state is supreme" (App. B-24) reverses our national political history directed toward more democratic political processes within the two major parties.

Over the years, the states have provided the mechanism for the selection of delegates, and as a general practice the national parties have accepted delegates chosen under the procedures laid out by the states. But the states may enforce their election laws only in ways not inconsistent with the right of the national parties, within federal constitutional limits, to formulate rules and procedures for, and to make decisions concerning, the selection of delegates to their national nominating conventions. National party rules, procedures and decisions concerning the selection of delegates to national party conventions obviously supersede state laws where conflicts occur; a contrary rule of law would surrender the necessary authority of the national parties in governing their national nominating systems to the mercies of 50 different state legislatures and their conflicting value judgments.[1]

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[1] This case presents only the question of state action in direct conflict with national party rules, procedures and decisions. A more difficult question *not* presented here, is whether state substantive law purporting to govern the eligibility and qualifications of delegates to the national party conventions (as contrasted with the mere establishment of procedures for the selection of delegates) is binding even in the absence of conflict.

Far from validating such intrusion on the parties' prerogatives, this Court has gone so far as to free the delegate selection process of the national parties not only from review by state courts but even from its own review and supervision. In *O'Brien* v. *Brown*, 409 U.S. 1, 4 (1972), this Court refused to intervene, and refused to permit the Court of Appeals for the District of Columbia Circuit to intervene, in a credentials dispute pending before the Democratic National Convention involving a substantial federal claim of due process violation—the changing of the rules of the Party after the California election for delegates had been held—a claim which the Court of Appeals had upheld on the ground that the Party's action was "arbitrary and unconstitutional." In so doing, this Court relied upon the fact that "for nearly a century and a half the national political parties themselves have determined controversies regarding the seating of delegates to their conventions." Or, as this Court also phrased it in its opinion, "It has been understood since our national political parties first came into being as voluntary associations of individuals that the convention itself is the proper forum for determining intra-party disputes as to which delegates should be seated." Certainly, since this Court deemed the federal judiciary barred from intervening in a credentials dispute at a national political convention even in a case where the Court of Appeals had found violation of the Federal Constitution, *a fortiori* state courts cannot intervene under state law. If the national nominating process is free of federal judicial review under federal constitutional law, much more does federal supremacy bar the intrusion of state court injunctive interference based on state law in conflict with national party action.

One could stop here; the decision at bar is governed by *O'Brien*. But this Court's action in failing summarily to reverse on the basis of *O'Brien* and in requiring full briefing of the case, would seem to justify *amici curiae* in setting forth the relevant history of the national political parties' actions in the selection of delegates as significant background for the decision of this case.

Amici wish to apprise the Court as to how the freedom of the national parties from the strictures of state law has been beneficial to the political development of the nation. The history of the Presidential nominating process has been a history of increasing public participation even when that necessitated the overriding of restrictive state law. The freedom of national parties from the obstruction of state law has brought greater democratic participation in the Presidential nominating process in many ways, three of which we review in this brief: (1) promotion of greater participation by minorities and women in the face of obstacles placed in their way by obstructionist state governments; (2) promotion of the development of a degree of loyalty to the Party whose candidate the delegates were choosing, thus developing a more cohesive and democratic party structure; (3) assistance to the ordinary citizen to find a place in the party against the closed, untimely, and otherwise undemocratic processes of political machines.

Before turning to an elaboration of these points, we should like to set forth one unique historical analogue for the present case. In August 1964, the Mississippi Freedom Democratic Party, largely black, challenged the delegation of the Mississippi Democratic Party at the Democratic National Convention on the ground that blacks had traditionally been excluded from all

participation in the "regular" or "traditional" Mississippi Democratic Party. On Wednesday, August 12, 1964, just prior to the Convention, Mississippi Chancery Court Judge Stokes V. Robertson, Jr., issued an order banning the Mississippi Freedom Democratic Party from using that name and its officers from functioning.[2] The injunction was issued at the request of the State.[3] The State's argument was that "the word Democratic already appears as part of another party and under state law a second group could not use it."[4] The state also complained that the Mississippi Freedom Democratic Party "did not lawfully organize, did not give proper notice of precinct meetings, county conventions and that, in fact, it was conceived in the minds of COFO [a civil rights organization] workers."[5] The main defendants were 10 Freedom Party leaders.[6] The following day, August 13, these Freedom Party leaders said they would proceed despite the court ruling.[7] The following week, Assistant Attorney General Rubel Griffin announced that he would file petitions against the delegates of the Mississippi Freedom Democratic Party citing them for contempt of court when they returned to the state.[8] "... we'll file our petition against the delegates just as soon as they return to the state."[9] But no such action was ever taken by the state; the

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[2] The *Clarion-Ledger* (Jackson, Miss.), 8/13/64, p. 1A, col. 7.

[3] *Ibid.*

[4] *Ibid.*

[5] *Ibid.*

[6] *Ibid.*

[7] The *Clarion-Ledger* (Jackson, Miss.), 8/14/64, p. 1A, col. 5.

[8] The *Clarion-Ledger* (Jackson, Miss.), 8/19/64, p. 8A, col. 4.

[9] *Ibid.*

Mississippi Freedom Democratic Party delegates attended the Convention and participated in its proceedings to the extent permitted by the Convention. They returned to Mississippi and no action was taken against them. Apparently, Mississippi in 1964 was more willing to accept the action of the Democratic National Convention than Illinois in 1972.

From the very first presidential nominating convention held prior to the 1832 election, the political parties of the United States have made their own determinations as to who should be seated at those conventions.[10] It has been the right to make those determinations free of restrictive state law that has served the parties and the nation well. We turn now to an examination of three particular aspects of this history.

I

NATIONAL PARTY VINDICATION OF THE PUBLIC INTEREST IN ELIMINATING DISCRIMINATION IN THE POLITICAL PROCESS

In the years following the disenfranchisement of blacks after the close of Reconstruction, the only avenue in the southern states open to black participation in the presidential election process was the Republican Party. Indeed, the Republican Parties of many southern states were the only political vehicles blacks had at any level. In 1948 and 1952, the National Republican Party was able to protect this limited, but vital, oasis of black participation only because it could act independently of state laws.

In 1946, the Georgia legislature passed a law providing that the Georgia secretary of state would make the

[10] P. David, R. Goldman, R. Bain, *The Politics of National Party Conventions* (1960), 259-264.

final determination of national convention credentials disputes involving parties polling less than 150,000 votes in the preceding presidential election—i.e., the Republican Party.[11] At that time there were two Republican factions in Georgia: a biracial wing known as the Tucker faction and a white segregationist wing known as the Foster faction.[12] In 1948, the Foster group secured a ruling from the Georgia secretary of state that it should be seated at the national convention. Despite that authoritative determination made pursuant to state law, the National Republican Party concluded that the Tucker group was better representative of the party rank and file and seated the integrated delegation.[13]

In 1952, the Georgia segregationists again attempted to block the seating of the biracial Republicans, this time through a state trial court decision declaring the Foster faction to be the legal Republican Party in Georgia. But once again the national party made an independent determination and seated the integrationist Tucker group.[14]

A similar situation existed in the Republican Party in Mississippi, and manifested itself in a decision at the 1952 national convention to disregard state law in the interest of racial justice. Since 1928, there had been

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[11] P. David, M. Moos, R. Goldman, *Presidential Nominating Politics in 1952* (1954) (cited as "David & Moos" hereafter), v. 3, p. 93.

[12] *Ibid.*, 91-92.

[13] *Ibid.*, 93.

[14] *Ibid.*, 94, 100-102; R. Bain and J. Parris, *Convention Decisions and Voting Records* (1973) (cited hereafter as "Bain & Parris"), 283-284.

two Republican parties in Mississippi. One group was known as the Black and Tans, a racially mixed party which had roots going back to Reconstruction and which traditionally had been seated by the national conventions. The other group was known as the Lily Whites, a rigidly segregationist group which emerged in 1928 in opposition to the Democratic candidacy of Governor Al Smith of New York.[15] In 1950, the Mississippi state legislature passed a bill which required political parties to register with the state, and which further stated that no one could claim to be a representative of a party without being selected according to the laws of the state and that no party could use in its title the name of any political party already registered in the state.[16] The Lily Whites registered immediately upon the signing of the statute into law, thus preempting the registration as Republicans by the Black and Tans.[17] The Mississippi Supreme Court upheld the statute and its application. *Hoskins* v. *Howard,* 214 Miss. 481, 59 So.2d 263 (1952). But despite this clear ruling of the highest court of the state, the Republican Convention seated the Black and Tans.[18]

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[15] David & Moos, v. 3, pp. 211-212; Harold Leventhal, "The Law of National Party Conventions," New York Law Journal, August 25, 1964, pp. 1, 4 (cited hereafter as "Leventhal").

[16] Mississippi Code, Sec. 3107-01 - 3107-06).

[17] David & Moos, v. 3, p. 213; Leventhal, p. 4.

[18] David & Moos, v. 3, pp. 213-221; Leventhal, p. 4. A federal three-judge district court panel declared the name restriction to be unconstitutional in *Howard* v. *Lardner,* 116 F. Supp. 783 (1953), but was summarily reversed by this Court without opinion by a 5-3 vote. *White v. Howard,* 347 U.S. 910 (1954). However, the only issue raised in federal litigation was the right of the state to restrict the use of a party label within a state for state purposes.

The National Democratic Party (NDP) efforts in in this area, while more recent, are more substantial in undertaking to eliminate racial discrimination in its ranks. The success of the struggle for non-discrimination in the party has been due, in no small measure, to the right of the national party to make ultimate determinations as to who shall sit as delegates to its national convention and whom it shall recognize as the national party representative in a given state.

In addition to the systematic exclusion of blacks from virtually all electoral processes in Mississippi, by the middle 1960s the whites who dominated the state-controlling and state-recognized Democratic Party (Regulars) had a history of failing to support both the NDP ticket and the most basic principles of the national party. Developing their own delegate selection processes, a group of blacks and a few sympathetic whites formed the Mississippi Freedom Democratic Party (MFDP)—a party totally committed to the national policies and candidates of the NDP. The MFDP challenged the right of the Regular delegates to sit at the 1964 convention.[19] The state attorney general's office sought an injunction from a state court under the law the Lily Whites attempted to use to block the integrated Republicans in 1952. The court granted an injunction barring the MFDP from functioning, and the state threatened to have the MFDP delegates held in contempt for traveling to the national convention in an effort to replace the segregationist Regulars.[20] The regular Democrats resisted the MFDP challenge and demanded the Convention seats on

[19] Bain & Parris, 315.

[20] The *Clarion-Ledger* (Jackson, Miss.), 8/13/64, p. 1A, col. 7; 8/19/64, p. 8A, col. 4.

grounds of state law. But the Convention imposed an historic compromise totally unrelated to state law. The Convention demanded a pledge of party loyalty from any "Regular" prior to seating (most refused and were not seated), offered the MFDP two delegates-at-large in the Convention, and proclaimed a party commitment not to permit such racial abuses in the future.[21]

Following the 1964 presidential election, the Democratic National Committee (DNC) acted on the Convention's anti-discrimination mandate and created the Special Equal Rights Committee. The Rights Committee's first report, issued in April 1966, gave notice to all state parties that failure to comply with standards of non-discrimination would mean "forfeiture of the right to be seated" at the 1968 Convention.[22] In January 1968, the DNC adopted the recommendations of Rights Committee Chairman Gov. Richard J. Hughes of New Jersey, recommendations known as the "Six Basic Elements."[23] The Six Basic Elements included requirements that all public party meetings be open to Democrats on a non-discriminatory basis; that no membership tests be based on support of racial, religious, or ethnic discrimination; and that all party processes be open to broad participation.[23a]

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[21] Bain & Parris, 315.

[22] Cited in Sehmidt and Whalen, "Credentials Contest at the 1968—and 1972—Democratic National Conventions," 82 Harv. L. Rev. 1438, 1450 (1969).

[23] *Ibid.*, 1450-1.

[23a] Cited in Commission on Party Structure and Delegate Selection, "Mandate for Reform" (1970), p. 39. This report, popularly known as the McGovern Commission Report, is reproduced in the Congressional Record, v. 117, part 25, pp. 32908-32921 (9/22/71).

In 1968, the national party determined that the Mississippi Regulars had not lived up to party requirements of non-discrimination, and seated the delegates of the well-integrated MFDP, recognizing it as the representative of the National Democratic Party in the state of Mississippi. This was done despite the fact that the unseated Regulars were chosen by the party organization recognized under state law.[24]

In the next four years, the Mississippi seats on the DNC were held by the MFDP (by now, popularly known as the Loyalists), and the Loyalist delegation was placed on the temporary roll of the national convention in 1972.[25] The Loyalists selected their delegates in a process that attempted to conform with the Mississippi statutory plan, which provided for a tiered-delegate selection process, beginning at the precinct level at the "regular voting places" on a particular date.[26] The Loyalists were unable to comply with all aspects of the relevant statute because, among other reasons, the Loyalists were denied certification by the secretary of state of Mississippi to use the regular voting places.[27] This denial was again based on the Mississippi party registration statute which barred the Loyalists from registering as the Democratic Party of Mississippi.

In late April 1972, after attempts by the Loyalists to work out a compromise with the Regulars had broken down, the Regulars brought suit in federal court against both the Loyalists and the national party to block seat-

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[24] Bain & Parris, 323.

[25] The underlying facts on the Mississippi seating in 1972 are set out in *Riddell v. National Democratic Party*, 344 F. Supp. 908 (S.D. Miss., 1972).

[26] 344 F. Supp. at 921.

[27] *Ibid*, at 914.

ing of the well-integrated Loyalists at the national convention on the ground that the Regulars' delegates, and only the Regulars' delegates, had been chosen to attend the Democratic National Convention in accordance with state law.[28] Although the court declared that the "Regular faction is the legal, official Democratic Party of the State of Mississippi, and that the Loyalist faction is not," it refused to grant the injunction sought by the Regulars, requiring only that the Regulars be given a fair hearing at the national convention.[29] That hearing was given, the Loyalists were seated, and the court rejected the Regulars' subsequent motion to enjoin the Loyalists, noting that "the National Democratic Party is a political organization, having no statutory rules or regulations to follow, but only the rules made by its own membership."[30]

Thus the national party continued to support the principle of meaningful black participation by continuing to recognize the integrationists in the presidential nomination process in the state of Mississippi. Had state law been controlling, that result would have been impossible.

The national party dealt with a similar situation of racial discrimination in the selection of the Georgia delegation in 1968. In Georgia all the delegates were picked by two men—Gov. Lester G. Maddox and state executive committee chairman James H. Gray—per an authorization from the state convention that was held two years prior to the national convention.[31] A challeng-

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[28] *Ibid.* at 910.

[29] *Ibid.* at 922.

[30] *Ibid.*

[31] Bain & Parris, 324; see *Smith* v. *State Executive Committee of the Democratic Party of Georgia*, 288 F. Supp. 371, 376-7 (N.D. Ga., 1968).

ing group, led by black state representative Julian Bond, charged that blacks had been systematically discriminated against. The Convention agreed with the challengers' allegations and decided to split the delegation between the two contending groups.[32]

The Georgia party had acted under authority granted by state statute, and its delegate selection procedure had been upheld against an attack on its constitutionality only days before the opening of the national convention.[33] Yet the national party, exercising its constitutional right of freedom of association, seated delegates from that state it believed to be more representative of its constituency and ideals, and in so doing, fostered black participation from Georgia. And the national party's decision had its salutary effect: The Georgia delegation to the 1972 national convention, chosen in accordance with the new party rules (discussed, *infra,* pp. 15-16) contained a true cross-section of Democrats from that state—blacks, including Rep. Bond, and whites, including Maddox's successor in the statehouse, James Carter.[34]

The 1972 Georgia delegation and those of the other states were far more reflective of the NDP's black constituency than the delegations to previous conventions. Overall, the proportion of blacks increased from 5 per cent in 1968 to 15 per cent in 1972.[35] This resulted in

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[32] Bain & Parris, 324.

[33] *Smith* v. *State Executive Committee, supra;* Code Ga. § 34-902.

[34] *Washington Post,* 6/29/72, p. A12, col. 1; *Atlanta Constitution,* 7/11/72, p. 1-A, col. 3.

[35] See *"Let Us Continue . . .", A Report on the Democratic Party's Delegate Selection Guidelines,* Americans for Democratic Action, p. 18 (based on U.S. Census and CBS surveys).

large measure from national party rules requiring state parties to "overcome the effects of past discrimination by affirmative steps to encourage minority group" participation and representation, and especially by shifting the burden of proof concerning such steps to the challenged party when minorities, women, and young people were not represented "in reasonable relationship to the group's presence in the population."[36] With the exception of the challenge involved in the instant case and delegations from two counties in New Jersey,[37] no delegations were restructured for having failed to conduct effective affirmative action programs to involve racial minorities. This great success was due to a significant degree to the awareness of the state parties that such restructuring could have been made if they did not work to open their doors to blacks.[38]

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[36] Mandate for Reform, 40; Memorandum on "Representation of Women, Young People and Minorities on National Convention Delegations," Commission on Party Structure and Delegate Selection, dated December 9, 1971 (on file in the office of the Commission's chairman, Congressman Donald M. Fraser). These requirements led, in addition to the above-mentioned increase in the proportion of black delegates, to an increase from 1968 to 1972 of Spanish-speaking delegates from 1 per cent to 5 per cent, of women from 13 per cent to 40 per cent, and of young people from 4 per cent to 21 per cent. See, *"Let Us Continue . . ."*, supra, n.35.

[37] See, ". . . of the People: Report of the Credentials Committee to the 1972 Democratic National Convention," 18-19, 41 (on file with the Democratic National Committee).

[38] The Guidelines explicitly barred the mandatory imposition of quotas. *Mandate for Reform,* 40. Thus, the issue before the Convention was not whether a given delegation had "enough" blacks or women or young people, but rather whether the state party had taken steps to encourage their involvement and could, if challenged, meet the burden of proof that they had done so.

The NDP has continued with this overall policy in its guidelines for the 1976 convention. Guideline 18A states that "[i]n order to encourage full participation by all Democrats, with particular concern for minority groups, Native Americans, women, and youth, in the delegate selection process" the various state parties "shall adopt and implement Affirmative Action Programs . . . to encourage such participation."[39] Failure to do so, according to Guideline 19G, "shall constitute grounds for a challenge *with* the burden of proof *on* the challenged party."[40] Thus, the party's ability to continue enforcement of efforts to involve these groups is contingent on its freedom to make the final decisions, within federal constitutional guidelines, on the seating of delegates.

The events set in motion by the MFDP in 1964 led to a series of commitments by the National Democratic Party on various governmental levels and within its own ranks to bring blacks into the mainstream of American political life. The national party made a commitment to racial equality and made it stick. And perhaps even more significantly, the commitment of the Democratic Party, galvanized by the events of 1964, facilitated the subsequent support by its presidential nominee after his election of the sweeping Voting Rights Act of 1965, which has brought such great and positive changes in the southern states.

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[39] "Report of the Commission on Delegate Selection and Party Structure as Amended and Adopted by the DNC Executive Committee," dated March 1, 1974 (on file at the Democratic National Committee.)

[40] *Ibid.*

II

NATIONAL PARTY VINDICATION OF THE PUBLIC INTEREST IN COHERENT NATIONAL ENTITIES ABLE TO PLACE PRESIDENTIAL CANDIDATES ON THE GENERAL ELECTION BALLOT WITH ASSURANCE THAT THE VOTERS CAN SUPPORT THE CANDIDATE OF THEIR CHOICE

Of vital importance to any national party is its ability to enforce some minimal degree of loyalty among the representatives of its adherents from the several states, and its ability to assure that its affiliated state parties will place its presidential ticket, appropriately identified and with pledged electors, on the general election ballot so that the voters may make an effective choice among the presidential nominees. The health of our existing electoral system is based in large part on the health of the major parties, and their ability to maintain some degree of coherence.

The maintenance of unity and coherence in party principles and procedures has been a problem for the National Democratic Party in recent decades. In order to assure that its supporters and potential supporters in the country will have the opportunity to vote for its presidential and vice presidential candidates, and that those candidates are able to run under the national party label, the Democratic Party has found it necessary to set some minimum standards of party loyalty and to enforce those standards at its national conventions.

The Democratic loyalty problem stemmed from the widening chasm in the late 1930s and 1940s between traditional Democratic organizations in the southern states and the rest of the party over a number of social

issues. In 1944, that chasm manifested itself in the Texas State Democratic Convention by "a series of resolutions declaring that the Texas electors would not be bound to support the nominees of the national convention unless certain demands were met." [41] Not only did the state convention threaten to withhold support from the national ticket, but it also selected presidential electors who were not pledged to vote for the national ticket, thereby proposing to prevent Texans from even voting for the presidential and vice presidential nominees of the NDP. The delegates chosen at the state convention were challenged by a delegation selected by Texas Democrats who had left the duly-authorized state convention rather than go along with the anti-national-party actions. The Credentials Committee decided that both should be seated, and the Convention upheld that decision over the Regulars' objections.[42]

In this instance, despite the fact that the Texas State Democratic Convention was the meeting authorized by state law,[43] the NDP sought to deal with an internal state party dispute based on clear issues of national party loyalty by disregarding state law in seating delegates. The compromise solution was successful; after the national convention, the Texas convention met again

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[41] Bain & Parris, 265; A. Holtzman, "The Loyalty Pledge Controversy in the Democratic Party," from *Cases on Party Organization*, P. Tillet (ed.) (1963), 124 (cited hereafter as "Holtzman").

[42] Bain & Parris, 265.

[43] See Vernon's Revised Civil Statutes of the State of Texas, Election Code, art. 13.58.

and selected electors committed to the Roosevelt-Truman ticket.[44]

In Mississippi that same year of 1944, the state convention voted to free its electors from an obligation to vote for the national ticket if certain similar demands were not met. A few days before the election, three electors announced they would not vote for Roosevelt-Truman, but the state legislature quickly provided for the inclusion of a loyal Democratic slate on the ballot.[44a] In both Texas and Mississippi, the national ticket won easily.

By 1948, the loyalty split in the party had become wider. Several southern Democratic parties sent delegates with "restricted credentials," that is, instructions to walk out of the convention if either the platform or the nominees were unacceptable.[45] The southern delegations were seated as offered by the respective states parties,[46] but the Mississippi and half the Alabama delegates walked out of the convention.[47] The walkout led to the formation of the States' Rights Party which ran Strom Thurmond (then Democratic governor of South Carolina, now a Republican senator from that state) for president and Gov. Fielding Wright of Mississippi for vice president.[48]

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[44] The final result was that in Texas the electors labeled as Democrats were committed to the national ticket, while the earlier selected unpledged electors ran under the title "Texas Regulars" (Holtzman, 124).

[44a] Holtzman, 124-125.

[45] Holtzman, 125.

[46] Bain & Parris, 273.

[47] The walkout followed the adoption of the Humphrey-ADA strong civil rights plank. Holtzman, 125.

[48] *Ibid.*

Many prominent southern politicians supported the walkout, and in Mississippi, South Carolina, Louisiana, and Alabama the state Democratic electors were pledged not to the Truman-Barkley ticket chosen by the national convention, but rather to the Thurmond-Wright ticket. Although loyal Democrats were able to get the national party candidates on the ballot (albeit not under the Democratic label) in three of the four states, in Alabama the state party bolt produced a situation in which the Truman-Barkley ticket was nowhere to be found on the ballot in November. The States' Rights ticket won the electoral votes of all the states in which it ran under the Democratic label and only of those states.[49]

Loyal Democrats subsequently gained control of the state party organization in Alabama and, under broad authority granted the state committee by a state statute, required voters to pledge support of the national ticket as a prerequisite to participation in the primary election for presidential electors. The pledge was upheld by this Court in *Ray* v. *Blair,* 343 U.S. 214 (1952).

In response to the 1948 desertions, the 1952 Convention resolved that no delegate could be seated without giving

> assurance to the Credentials Committee that he will exert every honorable means available to him in any official capacity he may have, to provide that the nominees of this Convention for President and Vice President, through their names or those of

[49] *Ibid.* One elector from Tennessee also voted for the States' Rights ticket. National Committee members from Alabama, Louisiana, Mississippi and South Carolina supported Thurmond and Wright, and the DNC declared their seats vacant.

> electors pledged to them, appear on the election ballot under the heading, name or designation of the Democratic Party.[50]

The Moody Resolution, as it was known, further stated that

> for this Convention, *only,* such assurances shall not be in contravention of the existing law of the State, nor of the previous instructions of the State Democratic governing bodies.[51]

Thus, the 1952 Convention asserted its right to determine the applicability of state law: a state law could not *compel* the party to seat a delegation not deemed by the convention to be in compliance with minimal requirements of party loyalty. As a result, the national ticket was on the ballot under the Democratic label in every state in 1952.

The DNC dropped the Moody Resolution from its Call to the 1956 Convention, but put in its place a resolution which required a degree of adherence by state parties and delegates to a minimal party standard. First, the resolution stated that it was

> the understanding that a State Democratic Party, in selecting and certifying delegates to the Democratic National Convention, thereby undertakes to assure that voters in the State will have the opportunity to cast their election ballots for the Presidential and Vice-Presidential nominees selected by said Convention, and for electors pledged formally or in good conscience to the election of these Presidential and Vice-Presidential nominees, under the Democratic Party label and designation.[52]

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[50] Quoted in Bain & Parris, 288.

[51] *Ibid.* at 289, emphasis added.

[52] Quoted in *Comment*, "The Democratic Party's Approach to Its Convention Rules," 50 Am. Pol. Sci. Rev. 553 (1956).

The resolution went on to state the assumption that all delegates certified by state committees were "bona fide Democrats" who would "participate in the Convention in good faith," but noted that "no additional assurances" would be required "*in the absence of credentials contest or challenge.*" [53] Thus the Party required not only a pledge of fair ballot position for the Convention nominees, but also went on record as holding that if delegates were otherwise demonstrably disloyal to the national party, they could be refused their seats in the event of a challenge, regardless of state law.

The 1956 Convention rejected challenges to the Mississippi and South Carolina delegations upon assurance from those delegations that they were in accord with the loyalty resolutions.[54] And again in 1956, the national ticket was on the ballot under the Democratic label in every state.

But following the 1956 election, the conflict was renewed between the southern leadership and the rest of the party over fundamental policies. Georgia and Arkansas passed laws allowing "state parties to 'free' electors from any party responsibility to the nominees of the national conventions," [55] and the Alabama state committee repealed its rule that participants in the state primary for the selection of party electors pledge themselves to support the national ticket.[56] The May 1960 Alabama primary resulted in the election of six

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[53] *Ibid.*, emphasis added.

[54] Holtzman, 148-9.

[55] *Ibid.*, 150.

[56] See *supra*, at p. 20.

"unpledged" Democratic electors and five loyalist electors.[57]

The 1960 national convention avoided any battles over seating of southern delegations, but following the Convention the Mississippi State Executive Committee endorsed a slate of unpledged electors under the Democratic label, leaving the Kennedy-Johnson slate on the ballot without the Democratic designation. The Democratic ticket won the 1960 presidential election, but the eight Mississippi Democratic electors and the six Alabama Democratic electors not pledged to Kennedy-Johnson cast their votes for Sen. Harry F. Byrd, Sr., of Virginia.

The challenge brought by the MFDP at the 1964 Democratic National Convention has already been discussed (pp. 5-7, 10-11). The MFDP stressed that the Regulars had not complied, and could not be expected to comply, even with the minimal requirements of party loyalty contained in the 1956 resolution that had been carried over to succeeding conventions. The MFDP cited repeated statements and actions by state party bodies and officials over the years and up to that time withholding support from the national ticket and totally dissociating itself from national party policies.[58] The Credentials Committee worked out a compromise which seated the Regulars, provided they signed a pledge to support the national ticket and made an effort to get their state's presidential electors to vote for it.[59] A similar disposition was made of a challenge to the

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[57] Holtzman, 150-1.

[58] MFDP Brief to 1964 Democratic National Convention (on file with Democratic National Committee).

[59] Bain & Parris, 315.

Alabama delegation. All but four of the Mississippi delegates walked out of the Convention; eleven of the Alabama delegates signed the oath, but the rest left the Convention.[60] In the general election, the Alabama Democratic electors ran in an unpledged status; no electors pledged to the national Democratic ticket were able to secure placement on the ballot.

The 1964 election produced defections to the Republican ticket on the part of a number of erstwhile southern Democratic leaders. These defections were part of the basis for the national party's decision at the 1968 Convention to recognize the Loyalists as the true representative of the NDP in Mississippi. Similarly, the fact that the Regular Georgia delegation had been directly selected by two men who had supported the Republican presidential candidate in the previous election was a factor in the national convention's determination of that challenge. In splitting the convention seats between the two contending groups, the Convention required the signing of a pledge by each delegate that he or she would support no presidential ticket other than the Democratic and would "take all necessary steps" to have the Democratic ticket placed on the ballot in Georgia.[61]

In 1968, both the Mississippi and Georgia Regular delegations were chosen pursuant to state law. The Georgia system had been upheld against an attack on its constitutionality shortly before the opening of the convention. Yet the national party, exercising its constitutional prerogative of freedom of association, seated delegations from those states it believed to be more

[60] *Ibid.*, 315-6.

[61] *Ibid.*, 324.

representative of the constituency and principles of the National Democratic Party. Had state law been interposed, the party's ability to represent and shape its constituency would have been nullified by the laws of the individual states.

III

NATIONAL PARTY VINDICATION OF THE PUBLIC INTEREST IN HAVING OPEN, DEMOCRATIC, AND REPRESENTATIVE DELEGATE SELECTION PROCESSES

It is a basic tenet of the American political system that for government to be responsive to the people, its highest officials must be selected by the people. Technicalities of the Electoral College notwithstanding, the voters of the United States do select their President. But as a practical matter, the public's choice is limited to the nominees of the major political parties. Therefore representative selection of our highest official requires that the party nominees be selected through democratic procedures. It is in the highest public interest that the major parties be able to assure that their delegates to national nominating conventions are truly representative of the party constituencies.

State statutes provide frameworks within which the convention delegates are chosen. As a general rule, delegates so selected—particularly when selected by direct election—are recognized by the national parties. However, as shown above in the areas of minority and woman participation and party loyalty, acceptance of those results would frequently have been destructive of fundamental principles of political freedom and party integrity. But even when matters of discrimination and party loyalty were not at issue, the parties

occasionally have had to act contrary to state law when the established procedures were abused or when such procedures proved inadequate to assure representative delegations.

The Republican experience in Texas in 1952 is instructive in this regard. National convention delegates were selected at the state party convention held pursuant to state law. Texas law also provided that the delegates to the state conventions were to be selected at precinct and county conventions.[62] Republican supporters of the presidential candidacy of General Eisenhower had been in the majority in many of the precinct and county conventions, but a large number of the results of those conclaves were rejected by the Republican State committee, which was controlled by supporters of Senator Robert Taft, on the ground that the Eisenhower delegates were really Democrats. The unseated Eisenhower delegates held their own state convention, and two delegations came to the national convention: A Taft-dominated slate chosen at the official state convention held pursuant to state law and an Eisenhower-dominated delegation chosen at the rival convention. The Taft delegation asserted that state law was controlling; the Eisenhower delegation charged that they had been wrongly excluded from the state convention. The Republican National Convention agreed with the Eisenhower position, and seated the Eisenhower delegation.[63] In this instance, the Republican National Party made the most fundamental of political determinations: the determination of who is a Republican. If state law had been allowed to control, the Convention would have

[62] David & Moos, v. 3, p. 320.

[63] *Ibid.*, 320-330.

been forced to seat the Taft delegation or possibly none at all, despite the national party determination that the Eisenhower delegation was indeed the delegation selected under the fairer and more representative process.

The Republican experience in 1952 was not the first reversal by a national convention of a boss-ridden delegate selection process. In 1880, the controlling group in the Illinois Republican convention disregarded choices made by several district caucuses and seated its own allies instead. But the national convention refused to seat the delegation as offered by the state party, and seated the delegates chosen freely in the district caucuses in place of those undemocratically appointed.[64]

The 1952 Republican Convention overruled the determination made by Texas party officials, acting under authority of state law, that the delegate selection procedures had been "raided" by the opposition. The 1908 Democratic Convention had faced a somewhat similar problem. A charge was made that five delegates from Philadelphia, Pennsylvania, had been selected in a state primary in which a minority Democratic faction had successfully conspired with Republicans to "raid" that primary, and that therefore the resulting delegates were not truly representative of the Democrats of that city. The objective evidence supporting the charge included the fact that in one of the affected districts the primary vote had been 2.7 times higher than the average turnout. The Convention agreed with the challengers, and the raid-produced delegates were unseated in favor of those who the party determined would have won had the process not been invaded by the opposi-

[64] Bain & Parris, 112.

tion.[65] The problem of raiding is ever present, most particularly in states holding "open primaries" where one need not be a registered party adherent to vote in that party's primary. Although the parties have not sought to overturn the results of such primaries since 1908, they should not be compelled to accept them.

Closed and unrepresentative processes have plagued both parties through the years. For example, the 1912 schism in the Republican Party between the supporters of William Howard Taft and Theodore Roosevelt may be attributed in large part to the inability of the delegate selection processes in many states to produce representative delegations.[66] But such problems have not been restricted to the conventions of 20, 60, and 100 years ago.

The events leading up to the Democratic National Convention of 1968 demonstrated that then-existing state-mandated procedures might not be adequate to assure representative delegations. The controversy in the Democratic party that year over the Vietnam War —a controversy that did not take the form of an open and substantial split over the presidential nomination until the March New Hampshire primary—highlighted these inadequacies. Delegate selection processes that began two or more years prior to the convention, that were unpublicized, that gave incumbent groups unfair advantages, that were malapportioned, that shut out widely-shared viewpoints, that discouraged the participation of important groups in the party's constituency, and/or that were open to various forms of abuse seri-

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[65] Bain & Parris, 175-6.

[66] See Bain & Parris 178-179.

ously damaged the party.[67] The danger to the party was so great that the National Convention resolved to set standards for the future selection of delegates and authorized the establishment of a party commission to develop those standards.[68]

In February 1969, in accordance with the mandate of the national convention, DNC Chairman, Sen. Fred Harris of Oklahoma, appointed the Commission on Party Structure and Delegate Selection, popularly known as the McGovern-Fraser Commission.[69] The McGovern-Fraser Commission conducted extensive research into the delegate selection process and held hearings all over the country before promulgating its guidelines in November 1969.[70] The guidelines were designed to eliminate or modify three frequently overlapping categories of irregularities discerned during the Commission's investigations: structural inadequacies, procedural abuses, and discrimination (see pp. 7-16, *supra*). Included in the first category—structural inadequacies—were prohibitions against delegation selection beginning before the calendar year of the convention, selection of more than ten per cent of the

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[67] These problems in the delegate selection process were catalogued just prior to the 1968 Convention in the Report of the Commission on the Democratic Selection of Presidential Nominees, a group formed by various party leaders. The Report is reproduced in the Congressional Record at v. 114, part 24, pp. 31544-31560 (10/14/68).

[68] Eli Segal, "Delegate Selection Standards: The Democratic Party's Experience," 38 Geo. Wash. L. Rev. 873, 879 (1970).

[69] So named for its first and second chairmen, Sen. George S. McGovern of South Dakota and Rep. Donald M. Fraser of Minnesota.

[70] Segal, 879-880.

delegation by committee systems, intrastate apportionment on the basis of anything other than population or Democratic strength, the assessment of any cost or filing fee in excess of ten dollars, and ex-officio delegates.[71]

To remedy procedural abuses, the unit rule, proxy voting, secret caucuses, and closed slatemaking, among others, were proscribed. Concluding that these abuses were usually caused by the absence, unavailability or inadequacy of party rules explaining the delegate selection process, the Commission required the adoption of state-wide party rules which would explicitly set forth the details of these processes.[72] The Guidelines were accepted by the DNC in February 1971 and were incorporated into the Call for the 1972 Convention.[73]

The Commission recognized that in some instances existing state statutes might preclude compliance with certain Guidelines. However, the Commission did not permit such statutes to be defenses to violations. Rather, the Commission required that when state law was in opposition, state parties would have to "make all feasible efforts to repeal, amend, or otherwise modify such laws to accomplish the stated purpose."[74] Thus, unless a state party made such efforts, an obstructing state law would not be a defense to a challenge.[75]

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[71] *Ibid.*, 880. This last prohibition was modified by the National Committee to allow for the automatic seating of members of the National Committee. *New York Times*, 2/20/71, p. 1, col. 6.

[72] Segal, 880-881.

[73] *New York Times*, 2/20/71, p. 1, col. 6; The Call for the 1972 Democratic National Convention, pp. 12-13.

[74] Mandate for Reform, pp. 40, 41, 44-48.

[75] On July 16, 1971, the Commission adopted standards by which the "all feasible efforts" requirement would be measured. These included the introduction and active support of appropriate legis-

Some state frameworks were quite specific as to how delegates were to be selected; others gave the state parties considerable freedom, making specific legislative determinations that the state party organizations were to set up the processes. But whatever degree of specificity in the law of a state, it was clear that a delegation chosen in conformity with state law could at the same time violate a party rule that was designed to maximize representation and further the political associational goals of the national party. Thus, the use of the unit rule at precinct, county, and state levels of a state-mandated caucus/convention delegate selection process—done without violating state law—would justify the national party in restructuring the state's delegation in a way that fairly reflected the division of presidential preferences of the rank and file. Failure adequately to inform the public of key stages in the delegate selection process might not be a violation of state law, but would justify the national party in fashioning a remedy. And, similarly, a delegation chosen by a party body selected two years prior to the holding of the national convention might be chosen in accordance with state law, but would warrant action by the national party to assure a timely-selected delegation reflecting current constituency sentiment.

The NDP proved in 1972 to be in earnest in its desire to have the delegates to its presidential nominating convention selected in open and democratic processes designed to maximize participation of the party rank

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lation, institution of litigation where constitutional issues might be involved, and use of party rules to cancel out the effects of non-complying statutes, where such action would be within the statute. (Document on file in office of Rep. Donald Fraser).

and file. In general, state parties either reformed their own systems within the context of permissive state statutes or secured the necessary changes in state laws.[76] In many instances the power of the national party to refuse to seat delegations that were not selected in conformity with its rules was the key factor in securing compliance. Without that authority, a state party organization fearful of the effect of reform on its own power, could simply have ignored these democratic reforms. Since substantial compliance was by and large secured with the exception of the challenges to delegates from Illinois, the Convention found it necessary to make only a few minor adjustments in the delegations selected according to the state-mandated procedures.[77]

How the national party's freedom from the restrictions of state law facilitated a convention more representative of the rank and file of the party may be demonstrated by focusing on the party's 1972 experience with two state delegations, Maryland and Michigan. Party delegate selection Guideline B-7 required that in states in which delegates were elected in primaries by districts, the delegates be apportioned among those districts by a formula "giving equal weight to total population and to the Democratic vote in the previous presidential election" as a means of assuring that Democrats be represented on a rough one-person, one vote basis.[78] The Maryland delegate selection statute, however, provided that an equal number of delegates would be elected from each congressional district,[79] even

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[76] See generally, "*Let Us Continue . . .*"

[77] See ". . . of the People: Report of the Credentials Committee to the 1972 Democratic National Convention," *supra*, n.37.

[78] Mandate for Reform, 45.

[79] Code Md. 1957, art. 33, §§ 12-1(a), 12-2.

though national party support was not uniform throughout the state. A Credentials Committee hearing officer conducted a hearing and concluded that the state party had not made "all feasible efforts" to bring the state law into compliance.[80] Faced with this finding, the leaders of the delegation (including the Democratic governor and lieutenant governor) had to reach a settlement with the challengers: the delegations from the underrepresented districts (the predominantly black 7th district in Baltimore and the liberal 8th district in the suburbs of Washington, D.C.) would select additional delegates to bring them to the number mandated by the party rule, while the votes of delegates from the overrepresented rural 1st, 4th, and 6th districts would be correspondingly reduced to fractional votes. The settlement was accepted by the Credentials Committee and the Convention.[81] It was equitable, yet it was contrary to the existing Maryland state law.

Michigan law provided for a presidential preference primary, followed by congressional district conventions, at which delegates would be selected among those committed to vote for the various presidential candidates in proportion to those candidates' vote in the primary.[82] However, in Michigan's 17th district, the delegates chosen to fill the slots won by the candidacy of George C. Wallace were not bona fide supporters of Wallace. The Michigan party leadership, and the state presidential campaign organizations of the other major

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[80] Hearing Officer Fisher's Report on the Challenge to the Maryland Delegation to the 1972 Democratic Convention (on file at DNC).

[81] ". . . by the People," *supra*, 11. *Washington Post*, 6/29/72, p. B3, col. 6; 7/2/72, p. B1, col. 8; 7/3/72, p. B1, col. 6. M. Barone, G. Ujifusa, D. Matthews, *The Almanac of American Politics 1974* (1973), pp. 417-432.

[82] Mich. Comp. Laws Ann. 168.613 *et seq.*

presidential candidates, all agreed to support a challenge to those delegates. The Credentials Committee upheld the challenge and the challenged delegates from the 17th district were replaced with legitimate supporters of the Alabama governor.[83] This was a decision made by the party in the interest of having delegates who truly represented the expressed candidate and ideological preferences of the voters, and in the interest of maintaining party unity. Yet, had state law been controlling, the state party of Michigan and the national convention would have been powerless to rectify the situation, beyond possibly eliminating part of the 17th district's representation altogether.

The Democratic Party's 1972 rules went a long way toward making its convention truly representative of the party constituency. Those rules, however, permitted the use of state-wide winner-take-all primaries, wherein the presidential candidate receiving a plurality of votes (no matter how small a portion of the total vote it may be) wins all the delegates.[84] Winner-take-all often served to block out representatives of large segments of a party.

The winner-take-all system was first used in California in 1912. At that time the Republican National Convention had a standing rule, originally adopted in 1880, that delegates should be elected at the congressional district level.[85] Under California law, the state-wide victory of Theodore Roosevelt over William Howard Taft netted Roosevelt every California delegate. But

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[83] ". . . by the People," pp. 51-52; *Washington Post*, 7/3/72, p. A4 col. 5.

[84] Party Guideline B-6 merely urged, but did not require, that such systems be eliminated. Mandate for Reform, p. 44.

[85] Bain & Parris, 123.

Taft had received the plurality in a San Francisco district and, in accordance with the national party's rule, the Convention seated the two Taft delegates from that district rather than those of Roosevelt.[86] The result as modified by the Convention was more reflective of the Republican constituency in California than was the state-mandated allocation of delegates, and was fully consistent with a long-standing Republican party rule.

At their convention in 1916, the Republicans decided to amend the rules to provide that delegates could be chosen entirely from a state at large and in conformity with the laws of the state.[87] One of the ramifications of the issue that the instant case presents to this Court is whether the Republican, Democratic, or any other national party should be compelled to take the course taken by the Republicans in 1916.

In fact, the 1972 Democratic National Convention mandated that in 1976 the Call should include the requirement that delegates be selected "in a manner which fairly reflects the division of preferences expressed by those who participate in the presidential nominating process."[88] Guideline 11 of the party's delegate selection rules for 1976 follows the mandate of the Convention by barring state-wide winner-take-all primaries.[89] The California winner-take-all primary, if still in effect in 1976, clearly would be inconsistent with party rules. The voters and candidates in California

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[86] P. David, R. Goldman, R. Bain, The Politics of National Party Conventions (1960), 262.

[87] *Ibid.* at 196.

[88] Convention Proceedings quoted in Bain & Parris at 334.

[89] "Report of the Commission on Delegate Selection and Party Structure as Amended and Adopted by the DNC Executive Committee," *supra*, n.39.

in 1976 will be on notice that the Convention will modify a winner-take-all result, and such a treatment, in the context of clear party rule, would be wholly equitable, and, indeed, more representative than the allocation provided by the present state law. But under the view advanced by the respondents in this case, the National Democratic Party and the Democrats of California could be prevented from providing for such an equitable distribution.

State laws applicable to the delegate selection process are not always adequate for producing delegations that are representative of the party rank and file. In those situations where they are not, it is in the public interest for the national parties to have the freedom to fashion remedies.

CONCLUSION

The Illinois Appellate Court's ruling that "the law of the State is supreme." (App. B-24) would turn back the clock to a bygone era and undo the long and beneficial history of national party developments described above. The process of nominating candidates for election as our Nation's Chief Executive is too important to be left to the mercies of state officials too often subject to undemocratic pressures. We respectfully submit the decision below should be reversed.

Respectfully submitted,

JOSEPH L. RAUH, JR.
JOHN SILARD
ELLIOTT LICHTMAN
DAVID S. FISHBACK
1001 Connecticut Avenue, N.W.
Washington, D.C. 20036

Attorneys for Amici Curiae